REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 189 OF 2012

1. BOROP MULTIPURPOSE CO-OPERATIVE

SOCIETY LIMITED.....................................1ST APPELLANT/APPLICANT

2. JOHN ROTICH...2ND APPELLANT/APPLICANT

VERSUS

DOUNE FARM LIMITED ....RESPONDENT

(An appeal from the Judgment and decree delivered on the 2nd of October, 2012, by S. Soita (Mr) Principal Magistrate in Molo PMCC No. 80 of 2005

RULING

1. By an application dated 19th September 2019 the Respondent moved the court under **Order 42 rule 35(1) of Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act** and **Articles 148, 50(e) and 159(2)(a)(b)** of the Constitution seeking an order for dismissal of the appeal filed herein for want of prosecution.

The appeal is against the trial court's judgment delivered on the 2nd October 2012, and filed on the 1st November 2012. However, the Record of Appeal was filed on the 12th June 2017.

The court record shows that the appellant did not take any action to progress the appeal, and on the 7th July 2015, it was dismissed, on court's motion, for want of prosecution, but upon application was reinstated on the 7th July 2016.

2. I have considered the rival parties affidavits for and against the present application, as well as the oral submissions.

For the applicant/Respondent in the appeal, there has been inordinate and inexcusable delay in progressing the appeal, **six years** after it was filed, for no good or reasonable grounds, which situation has caused the Respondent prejudice, by not being able to enjoy the fruits of its judgment.

3. The Respondent/appellant blames the court for what it alleges to be failure to fix the appeal for directions before the Court under Provisions of **Order 42 rule 25(1) Civil Procedure Rules,** submitting that no appeal ought to be dismissed for want of prosecution unless directions under Order 42 rule 13 have been taken, and further that the Respondent could also have moved the court to set down the appeal for hearing.

4. It is trite that every person has a right to be heard by a court of law in a fair and public hearing as provided under **Article 48 and 50 of the Constitution.** These rights are however not absolute, but subject to other parties rights, to fair administrative action that includes being heard expeditiously, in terms of **Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.**

5. The court is enjoined to facilitate the just, expeditious and proportionate resolution of civil disputes, in an efficient and timely manner.

There can be no justice to any party to a suit when deliberate delay is exhibited by one, to the disadvantage of the other, thus the provisions under **Order 42 rule 35(1) and (2)** for dismissal of appeals for want of prosecution.

6. I have not seen any overt efforts or at all by the appellants to progress the appeal. It is noted that the appeal was earlier on dismissed for

the very same reason, unexplained and unreasonable delay. Even thereafter no concerted effort can be seen in the manner and conduct by the appellants.

7. As stated in the case **Ivita –vs- Kyumbu (1984) 441**,

> "the test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and unexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay…."

8. The Respondent herein relies heavily on provisions of **Order 42 Rule 35 (1) and Rule 13** that alludes to directions being taken before an appeal may be dismissed, and that it is the duty of the Deputy Registrar of the court to place the said appeal before the Judge for the directions

9. A suit (or appeal) belongs to the plaintiff (or appellant). It is expected that the appellant would move the court, by application, for any action it wishes the court to take.

If parties were to wait for the Deputy Registrar to move the court, save in few circumstances, like issuing notices to show cause, then nothing would ever take place, as the court lack both the manpower and knowledge of what each litigant may wish brought to the court's attention.

10. **In Jaribu Credit Traders Ltd –vs- Mumias Sugar Company HCCC No 165 of 2009,** the court held that as it is the appellant who dragged the Respondent to court by the Appeal it is its duty to take steps to progress their case, and not want for the respondent to take a hearing on its behalf.

It is not the duty of the Deputy Registrar to solely move the court for an order of dismissal. If it were so, it would be a sad day for litigants as Deputy Registrars, ordinarily and in practice, have to be moved to take action in suits by the litigants- See also

Simon Githui Kibuchi & Another –vs- Hannah Wanjiku Njenga (2017) e KLR.

11. There is no doubt that the appellants have never been willing and ready to progress the appeal.

Their conduct since 2017 says volumes. The appeal was dismissed for the same reason. After reinstatement, they went to sleep and were only awokened by the filing and service of this application when they realised that they had not moved the court on the appeal, save a letter dated 16th April 2018 requesting the Deputy Registrar to fix the appeal for Directions. It is instructive that since then, no other action was taken.

12. That in my considered view is unwarranted and inordinate delay, and lack of interest in the appeal. This court is a court of equity. It will not aid the indolent but the vigilant. **Article 159(2) (b) of the Constitutionas as well as Sections 1A, 1B and 3A of the Civil Procedure Act** enjoins the court but to dispense justice expeditiously. It is also trite that Justice delayed is Justice denied.

By all measures and standards, an appeal filed in the year 2012, ought not be in the court registry shelves and cabinets. It not only causes backlog but is an affront to justice, that should be dispensed expeditiously.

13. By and large, I am not persuaded that the Appellants have explained the inordinate delay sufficiently. The appeal having been dismissed for want of prosecution in 2015, the appellants ought to have moved with speed, upon its reinstatement, to finalise it but instead, slept, and now blames the court for its failures.

There being no plausible and sufficient grounds to explain the inordinate delay of six years, I proceed to dismiss the appeal for want of prosecution with costs in terms of prayers No. 2 and 3 of the application dated 19th September 2019.

Orders accordingly.

Delivered, signed and dated at Nakuru this 20TH Day of February 2020.

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J.N. MULWA

JUDGE